



**Before The
State Of Wisconsin
DIVISION OF HEARINGS AND APPEALS**

In the Matter of the Revocation of Driveway
Permit #40-27-66 on Property Owned by J&E
Investments

Case No.: TR-10-0013

In the Matter of the Revocation of Driveway
Permit #40-170-64 on Property Owned by 2100
Mayfair Road LP

Case No.: TR-10-0014

FINAL DECISION

With respect to Case No. TR-10-0013, on August 20, 2009, the regional permit coordinator for the Southeast Region of the Department of Transportation (Department) issued an order to J&E Investments. The order revoked driveway access permit no. 40-27-66. Driveway access permit no. 40-27-66 authorized a driveway access from State Trunk Highway 100 (STH 100) at property located at 2130 Mayfair Avenue, City of Wauwatosa, Milwaukee County. On September 14, 2009, J&E Investments appealed the regional office's revocation order to the Department. By letter dated March 5, 2010, the Department affirmed the regional office's decision. By letter dated April 1, 2010, J&E Investments, by its attorney, S. Todd Farris, requested an administrative hearing before the Division of Hearings and Appeals (DHA) to review the Department's revocation order.

With respect to Case No. TR-10-0014, on September 16, 2009, the Department's access management engineer for the Southeast Region issued an order to 2100 Mayfair Road LP revoking driveway access permit no. 40-170-64. Driveway access permit no. 40-170-64 authorized a driveway access from STH 100 to property located at 2100 Mayfair Avenue, City of Wauwatosa, Milwaukee County. On September 28, 2009, 2100 Mayfair Road LP appealed the regional office's revocation order to the Department. By letter dated March 11, 2010, the Department affirmed the regional office's decision. By letter dated April 1, 2010, 2100 Mayfair Road LP, by its attorney, S. Todd Farris, requested an administrative hearing before the DHA to review the Department's revocation order.

On May 20, 2010, Attorney Farris filed a joint Motion Seeking Summary Judgment on behalf of J&E Investments and 2100 Mayfair Road LP. After an opportunity for briefing, a ruling denying the motion was issued on August 9, 2010, by

the administrative law judge assigned to these matters. On August 27, 2010, a prehearing conference was conducted to establish a prehearing schedule and schedule an evidentiary hearing in these matters. Pursuant to due notice, a combined hearing was conducted in Waukesha, Wisconsin, on May 5 and 6, 2011. Mark J. Kaiser, Administrative Law Judge, presided.

In accordance with Wis. Stat. §§ 227.47 and 227.53(1)(c), the PARTIES to this proceeding are certified as follows:

J&E Investments and 2100 Mayfair Road LP, petitioners, by

Attorney S. Todd Farris
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Milwaukee, WI 53202

Pursuant to stipulation, on August 31, 2011, an order was issued substituting the counsel of record for J&E Investments. J&E Investments is now represented by:

Attorney Alan Marcuvitz and
Attorney Andrea Roschke
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Wisconsin Department of Transportation, by

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The Administrative Law Judge (ALJ) issued a Proposed Decision in these matters on July 21, 2011. On August 4, 2011, the petitioners filed comments objecting to the Proposed Decision and the Department filed a letter supporting the Proposed Decision. On August 5, 2011, the Department filed supplemental comments responding to the petitioners' objections. On August 9, 2011, the petitioners filed a response to the Department's supplemental comments.

The petitioners' first objection to the Proposed Decision is its argument that the Department does not have the authority to revoke driveway access permits. This issue was the subject of the summary judgment motion filed by the petitioners. The ALJ denied the petitioners' motion and ruled that the Department does have such authority. The basis for concluding that the Department has the authority to revoke driveway access

permits is adequately set forth in the ruling denying the petitioners' motion. The petitioners' response to the Department's supplemental comments is limited to its contention that the instant cases are ones of first impression with respect to the Department asserting the authority to revoke driveway access permits. The petitioners base this contention on the fact that in response to discovery requests, the Department produced documents relating to only "one instance in which the Department claimed a right to revoke a driveway permit under somewhat similar circumstances."

The Division of Hearings and Appeals (DHA) is unable to comment on the accuracy of the Department's discovery response. However, the DHA has conducted other hearings and issued decisions in cases involving the review of Department decisions to revoke driveway access permits (see, *e.g.*, In the matter of the Revocation of a Driveway Permit (#22-2-89) Issued to Marcella Dietzel, 94-H-889, In the Matter of the Revocation of a Driveway Permit to Humbird Land Corporation onto USH 12, Town of Warren, St. Croix County, TR-03-0044, In the Matter of the Revocation of Permit Number 10-97C-75 Issued to Chili Corners Tavern for Two Driveway Accesses to United States Highway 10, in the Town of Fremont, Clark County, TR-07-0039, and In the Matter of the Denial of a Driveway Appeal from Commonweal Development Corporation by the Department of Transportation, TR-09-0062). Although the cases that have gone to a hearing have been infrequent, there is no doubt that the Department has been exercising its authority to revoke driveway access permits for a long time. The instant matters are definitely not cases of first impression. There may not be any case law expressly upholding the Department's authority to revoke driveway access permits; however, there is also no case law limiting the Department's power to revoke these permits. In light of the Department's long standing exercise of its authority to revoke driveway access permits, a finding that it does not have such authority would constitute a significant departure from the *status quo*, not the affirmation of that authority.

The petitioners' second objection is to the standard for reasonable access used in the Proposed Decision. There is no statutory or administrative definition for the phrase "reasonable, alternative access" as applied to driveway accesses. The petitioners' expert has developed a set of factors to consider for evaluating whether a driveway constitutes "reasonable, alternative access" that has been used by the Department. This set of factors was considered by the ALJ in the Proposed Decision. Obviously, the petitioners object to the finding that the driveway accesses from the public alley constitute reasonable, alternative access, but the factors considered to arrive at this finding are those proposed by the petitioners' own expert witness.

The petitioners' next objection is that the ALJ erred in excluding evidence of the impact that the closing of the Mayfair Road driveway accesses will have on the values of the petitioners' properties. The identified issue in these matters is whether the petitioners have reasonable, alternative access to the existing accesses on Mayfair Road. The financial impact of the elimination of the Mayfair Road accesses was not identified as an issue for the hearing. This is the issue that has been considered in all the hearings conducted by the DHA reviewing Department orders revoking driveway access permits. The petitioners have cited no authority holding that the financial impact on the petitioners

of the elimination of the Mayfair Road accesses is a proper issue for the DHA to consider in these matters.

The petitioners' next objection is that the ALJ erred in considering the impact on public safety of the revocation of the petitioners' driveway access permits for driveways onto Mayfair Road. Improvement to public safety was the primary basis for the Department's action. The Department's authority to consider public safety when overseeing driveway access permits is found at Wis. Admin Code § Trans 231.03(2).

The petitioners' final set of objections relate to findings of fact that they argue are not supported by the evidence in the records. These findings are:

- 1) That the location of the primary access to the petitioners' properties would be located on a public alley will not place the petitioners at a competitive disadvantage with respect to attracting tenants for their buildings;
- 2) That the petitioners control the aesthetics of the alley and can take steps to improve the attractiveness of the entrances to their properties;
- 3) That visitors to the petitioners' properties could be directed to the driveways from the public alley by means of minor signage; and,
- 4) That the twenty foot wide alley is sufficient to accommodate the projected traffic that will be using it after the Mayfair Road accesses are closed.

These findings are supported by the testimony of Department witnesses. The petitioners may disagree with this testimony, but did not present testimony refuting it. Even the petitioners' expert agreed that the existing driveways from Mayfair Road are unsafe. The only question is whether the driveway accesses from the public alley constitutes reasonable, alternative access to the Mayfair Road accesses. The evidence in the record supports the ALJ's finding that they do. A primary concern of the petitioners is that they are entitled to compensation if the Mayfair Road accesses are revoked. One can certainly appreciate that some compensation would be equitable. However, the DHA does not have the authority to order compensation and is not the proper forum for the petitioners to request it. The petitioners' objections are not persuasive and the Proposed Decision is adopted as the final decision in this matter.

FINDINGS OF FACT

The Administrator finds:

1. On August 15, 1966, the Department of Transportation (Department) issued driveway access permit no. 40-27-66 to Upjahn National Leasing Company (exh. 124). Driveway access permit no. 40-27-66 authorized the construction of a commercial-urban driveway access from State Trunk Highway 100 (STH 100 or Mayfair Road) in Wauwatosa, to property located at 2130 Mayfair Road. The subject property is located in

the southeast corner of the intersection of Mayfair Road and Garfield Avenue.¹ The intersection of Mayfair Road and Garfield Avenue is a “T” intersection with Garfield Avenue running east from Mayfair Road.

2. The property at 2130 Mayfair Road is currently owned by J&E Investments. The property is approximately .5 acre in size and has approximately 150 feet of frontage on Mayfair Road and additional frontage on Garfield Avenue. The rear of the lot abuts a public alley that connects to Garfield Avenue. A two story multi-tenant commercial building exists on the property. The building is approximately 12,000 square feet in size.

3. The 2130 Mayfair Road building is currently leased to two tenants. The tenants of the building are Tower Optical, a retail supplier of optometric services, and Knight Barry Title Company. Adjacent to the south side of the building is a surface parking lot with approximately thirty parking stalls. The parking lot has one row of parking spaces along the building and another row on the opposite side of the lot. The parking lot has a travel lane in the middle. The primary access to the parking lot is from the driveway access on Mayfair Road. Two driveways from Garfield Avenue provide access to a small parking lot and loading dock area. The parking lot accessible from Garfield Avenue can accommodate four to six vehicles parking parallel along the north and east sides of the building.

4. On May 28, 1964, the Department issued driveway access permit no. 40-170-64 to John L. Flanagan and Nolan Kenney (exh. 140). Driveway access permit no. 40-170-64 authorized the construction of a commercial-urban driveway access from STH 100 in Wauwatosa to property located at 2100 Mayfair Road. The 2100 Mayfair Road property is located immediately south of the 2130 Mayfair Road property.

5. The property at 2100 Mayfair Road is currently owned by 2100 Mayfair Road LP. A two story multi-tenant commercial building exists on the property. The building is approximately 30,000 square feet in size. The building is leased to various office and retail tenants. A 48 stall tenant parking lot exists beneath the office building. Current tenants of the building include a chiropractor, New Horizons Learning Center, a law office, Western-Southern Life Assurance Company, Zenith Administrators, and Salon 2100, a hair salon (testimony of John Hoffman).

6. At the time 2100 Mayfair Road LP acquired the property, the partnership also acquired a 99 year lease on an almost one acre surface parking lot located immediately south of the 2100 Mayfair Road property (the driveway access that the Department is attempting to revoke provides access to the leased parking lot). The surface lot has 112 parking stalls.

¹ The street is referred to as both “Garfield Avenue” and “Garfield Street” throughout the record in this matter. In this decision, “Garfield Avenue” will be used exclusively.

7. The combined 2100 Mayfair Road property and adjacent parking lot has 450 feet of frontage on Mayfair Road. The building is oriented to face Mayfair Road. Currently the primary access to the surface parking is from the driveway access on Mayfair Road. Access to the underground parking is from the alley off of Garfield Avenue.

8. Mayfair Road is a six lane, divided, north/south roadway. The Department classifies it as a tier three roadway. The average daily traffic count on Mayfair Road (measured in 2006) is 38,400 (exh. 144). The speed limit on this stretch of Mayfair Road is forty miles per hour. The buildings along the Mayfair Road corridor house prime office space and a variety of retail businesses, including big box stores and a regional shopping mall.

9. The Department is planning a resurfacing and partial reconstruction project for an approximately two mile stretch of Mayfair Road from Walnut Street to Burleigh Street in Wauwatosa (exh. 104). As part of the project, the Department is seeking to minimize the driveway accesses on Mayfair Road. Consistent with this goal, the Department is planning to remove the driveway accesses from Mayfair Road for the buildings at 2130 and 2100 Mayfair Road.

10. By letter dated June 11, 2009, the Department notified J&E Investments of its plan to remove the driveway for its building at 2130 Mayfair Road (exh. 120). On August 20, 2009, the Department's regional permit coordinator for the Southeast Region issued a revocation order for driveway access permit no. 40-27-66 (exh. 121). On September 14, 2009, J&E Investments, LLC, appealed the regional office's revocation order to the Department. By letter dated March 5, 2010, the Department affirmed the regional office's decision (exh. 122). The basis for the revocation of the driveway access permit as stated in the Department's March 5, 2010 letter is that allowing the driveway to continue "pose[s] an unsafe condition into the future" and the property has "other sufficient ways of access," specifically "via the alley off of Garfield Avenue." By letter filed on April 2, 2010, J&E Investments then requested a hearing before the Division of Hearings and Appeals (DHA) to review the Department's revocation order.

11. By letter dated June 23, 2009, the Department notified 2100 Mayfair Road LP of its plan to remove the driveway for its building at 2100 Mayfair Road (exh. 11). By letter dated September 16, 2009, the Department's access management engineer for the Department's Southeast Region notified the attorney for 2100 Mayfair Road LP that it was revoking the driveway access permit for the driveway access from Mayfair Road to the 2100 Mayfair Road property (exh. 141). On September 28, 2009, 2100 Mayfair Road LP appealed the regional office's revocation order to the Department. By letter dated March 11, 2010, the Department affirmed the regional office's decision (exh. 142). The basis for the revocation of the driveway access permit as stated in the Department's March 11, 2010 letter is that allowing the driveway to continue "pose[s] an unsafe condition into the future" and the property has "other sufficient ways of access," specifically "via the alley off of Garfield Avenue." By letter filed on April 2, 2010, 2100

Mayfair Road LP then requested a hearing before the DHA to review the Department's revocation order.

12. The driveway access for the 2100 Mayfair Road property is located on what is marked as the end of the exit ramp from United States Highway 45 (USH 45). The speed limit on the exit ramp is 55 miles per hour (mph). Thus motorists travelling to the 2100 Mayfair Road property via USH 45 would be decelerating rapidly on the exit ramp in order to make a right turn into the driveway. Motorists traveling north on Mayfair Road to the 2100 Mayfair Road property would also need to make an unsafe movement to reach the driveway. Those motorists would have to cross over striped markings onto the exit ramp and then turn right into the driveway.

13. The driveway for the 2130 Mayfair Road property is approximately 185 feet north of the driveway for the 2100 Mayfair Road property and 158 feet (.03 mile) south of Garfield Avenue (exh. 124). The driveway is beyond the markings for the exit ramp from USH 45. However, it does not meet the minimum spacing guidelines currently used by the Department for locating an intersection or driveway from the end of an exit ramp. For new design, the closest the Department would allow an access point from the end of an exit ramp is approximately a thousand feet or a quarter of a mile (testimony of Patrick Hawley).

14. North Avenue is also a major arterial. (Mayfair Mall is located at the intersection of North Avenue and Mayfair Road). For traffic engineering purposes, the functional area of an intersection includes the roadway influenced by the intersection. The intersection of Mayfair Road and North Avenue is signalized. When traffic on northbound Mayfair Road has a red light at the intersection with North Avenue, vehicles can back up to south of the intersection with Garfield Avenue. The functional area of the USH 45 exit ramp includes the area where vehicles from the exit ramp are merging with traffic on Mayfair Road. The petitioners' driveways are located within the functional area of both the North Avenue intersection and the USH 45 exit ramp. The access guidelines used by the Department discourage the permitting of driveway accesses within the functional area of an intersection (testimony of Patrick Hawley).

15. For 2005, the statewide average crash rate for urban streets was 248 crashes per one hundred million vehicle miles (HMVM). During the time period from 2001 to 2005, the stretch of Mayfair Road between Walnut Street and North Avenue had 266 total reported crashes which equates to an average crash rate of 1005 crashes per HMVM (exh. 104). Of the 248 reported accidents that occurred on the stretch of Mayfair Road between Walnut Street and North Avenue, 28 are identified as occurring in the vicinity of the intersection with Garfield Avenue. The Department submitted an assortment of accident reports for accidents that occurred on Mayfair Road in the vicinity of Garfield Avenue between 2001 and 2009 (exhs. 107 and 111). Of the accidents described in these reports, an attempt by a motorist to turn into one of the petitioners' driveways is expressly identified as a factor in six of the crashes.

16. Mayfair Road currently has a median between the north and south bound lanes. Therefore, neither of the subject driveways is accessible by southbound motorists on Mayfair Road turning left into either of the driveways. The most direct path for motorists traveling south on Mayfair Road to reach either property is to turn left onto Garfield Avenue and then right into the alley at the rear of the properties. Alternatively, southbound motorists can proceed approximately a thousand feet past the properties, make a “U” turn at a median break south of USH 45 and proceed northbound on Mayfair Road. The motorist could then turn right into either of the subject driveways.

17. The driveway access from Mayfair Road to the surface lot leased by the owners of the 2100 Mayfair Road property is pavement marked for one way traffic moving from west to east. The driveway access from Mayfair Road has an arrow pointing into the parking lot and the driveway access to the public alley is marked “Do Not Enter.” The rows of parking spaces abutting the travel lane are angled. This further indicates that the property owner is attempting to establish one way traffic (from west to east) in the parking lot. In other words, motorists are directed to access the parking lot from Mayfair Road and exit it via the alley. There was no testimony whether visitors to the property abide by this demarcation; however, the existence of the pavement markings does indicate that the property owner considers the public alley as the primary egress from the parking lot.

18. As part of the highway improvement project, the Department also intends to close the median opening at the intersection with Garfield Avenue. This means that motorists traveling south on Mayfair Road will be unable to turn left at Garfield Avenue to access the properties of the petitioners. Accordingly, for motorists approaching the petitioners’ properties in the southbound lanes of Mayfair Road, the most direct route to the properties is the one described above, *i.e.* make a “U” turn at the median break south of USH 45 and proceed northbound on Mayfair Road.

19. Currently, the most common route for motorists exiting the petitioners’ properties and intending to head southbound on Mayfair Road is to exit from one of the Mayfair Road driveways, cross the northbound lanes of Mayfair Road and make a “U”-turn at the Garfield Avenue intersection. It is necessary to make a “U”-turn at the Garfield Avenue intersection as opposed to exiting via the public alley, turning left onto Garfield Avenue and left again onto Mayfair Road because left turns from Garfield Avenue onto southbound Mayfair Road are prohibited (reports of John Stockham, exhs. 13, page 12, and 20, page 12).

20. After the improvements are made to Mayfair Road, two possible routes for motorists exiting the petitioners’ properties and intending to head southbound on Mayfair Road exist. A Department witness testified that visitors exiting the petitioners’ property could turn right (northbound) from Garfield Avenue unto Mayfair Road. The motorist could then make a lawful “U”-turn at the intersection of Mayfair Road and North Avenue (testimony of Patrick Hawley). John Stockham, the petitioners’ expert, testified that the route he believes most visitors leaving the petitioners’ properties and intending to head southbound on Mayfair Road would take is turning right from the public alley unto

Garfield Avenue, proceeding eastbound on Garfield Avenue to 106th Street, and turn left on 106th Street. The visitor would then proceed north on 106th Street to North Avenue, turn left on North Avenue, proceed westbound on North Avenue to Mayfair Road, and finally turn left on to Mayfair Road. This route would increase the distance travelled by 4000 feet and add between 136 and 273 seconds of travel time (exh. 13, sec. 7.3).

21. Closing the driveway accesses would require using some of the existing parking spaces for turn around maneuvers. Both property owners would lose a few parking stalls; however, there was no testimony that this would result in a shortage of parking for either property.

22. The public alley continues north of Garfield Avenue. The building facing Mayfair Road on the northeast corner of the intersection of Garfield Avenue and Mayfair Road does have a driveway access from Garfield Avenue, but does not have an access from Mayfair Road.

23. Studies indicate ease of access is more important to businesses that are characterized as drive-by businesses, as opposed to destination businesses. Drive-by businesses are businesses such as fast food restaurants, gas stations, and convenience stores. Customers of these types of businesses may bypass a business if the access to the location is not apparent. Each of the petitioners has a retail tenant that potentially will be impacted by the loss of direct driveway access from Mayfair Road. The affected businesses are Tower Optical and Salon 2100. No evidence was presented that would quantify the impact on the businesses. However, neither of these are the type that would be considered drive-by businesses. Additionally, the negative impact of removing the Mayfair Road accesses could be mitigated by signage.

24. Another factor is whether the public alley can handle the increased traffic that will result from moving the primary access for both properties to the public alley. The alley is twenty feet wide. Although this is wide enough for two way traffic, the only testimony presented at the hearing was that vehicles tend to drive down the middle of the alley and wait for another vehicle to pass before proceeding. The two office buildings are close to the alley on the west side and a row of residential garages are located on the east side of the alley. The garages are for homes fronting on 107th Street. Snow removal will also be a problem because there is no room for snow storage on the sides of the alley.

25. Based on the nature of the business occupying the space in the petitioners' buildings and including the residential users of the public alley, the Department estimated that there would be slightly less than 500 vehicles per day using the alley (testimony of Arthur Baumann). John Stockham used a different trip generation calculation and estimated that there will be more than 800 vehicles per day using the public alley (exh. 20, page 32). However, Mr. Stockham also testified that at peak times there could be 73 vehicles per hour using the alley. A peak traffic volume of 73 vehicles per hour is barely a vehicle per minute. Even at a width of only twenty feet, the alley should be able to handle the volume of traffic generated by the businesses occupying the petitioners' properties and the residential properties located on the alley.

26. Spaces in the surface lot are leased by Dave and Busters and a car dealer. Both businesses located on the west side of Mayfair Road. Use of the surface lot by those businesses will be less convenient after the median on Mayfair Road is closed at Garfield Avenue. However, there was no indication that either of these businesses would terminate their lease arrangement for use of the lot.

Discussion

There is no serious dispute that the petitioners' existing driveway accesses from Mayfair Road are unsafe and do not meet the engineering guidelines that the Department follows for locating driveways. However, a person who owns property abutting a public street has a right of access, or right, subject to reasonable regulation, of ingress and egress to and from the public street. *Stefan Auto Body v. State Highway Commission*, 21 Wis.2d 363, at 370, 124 N.W.2d 319, (1963). Accordingly, the driveway access permits may only be revoked if reasonable, alternate access exists for the two properties. The only alternative access for both properties is from a public alley on the east side of the properties.² The parties addressed several factors that should be considered in evaluating whether the accesses off the public alley constitute reasonable, alternatives to the existing accesses on Mayfair Road.

Two of the factors to be considered in evaluating whether the driveway accesses from a public alley at the rear of the subject properties constitute reasonable, alternative accesses to replace ones from a major thoroughfare are whether the alternative accesses to the properties will be apparent to visitors to the properties and whether the convenience of the accesses will be competitive with comparative properties. With respect to these factors, the accesses to many of the buildings on the Mayfair Road corridor are not on Mayfair Road. Relocating the primary accesses to the petitioners' properties should not put the petitioners at a competitive disadvantage. Additionally, although the relocated accesses may not be clearly visible from Mayfair Road, the location of the accesses at the rear of the properties is not unexpected and should not be confusing to visitors to the properties. As noted in the Findings of Fact, all vehicles that park in the parking lot underneath the 2100 Mayfair Road building must access that parking from the public alley. This fact suggests that at the time the properties were developed, the alley was considered to be, at a minimum, a secondary access for these properties.

Another factor related to the closing of the Mayfair Road driveways and making the accesses from the public alley the primary accesses to the petitioners' properties is the added time and distance for motorists to reach the subject properties. The distance from

² As mentioned in the Findings of Fact, two driveway accesses from Garfield Avenue exist for the 2130 Mayfair Road property. However, those driveways only provide access to a very limited amount of parking and to a loading area. Due to the elevation of the property and the layout of the building on the property, the Garfield Avenue driveways do not provide access to the main parking lot for the building and can not be modified to provide such access.

the existing driveway on Mayfair Road for the 2130 Mayfair Road property and the driveway access to the property from the public alley is 300 feet. The distance from the existing driveway on Mayfair Road for the 2100 Mayfair Road property and the driveway access to the property from the public alley is 1000 feet. For visitors that are northbound on Mayfair Road and seeking ingress to either of the petitioners' properties the added travel time and distance is not significant. Similarly, visitors leaving either of the properties and intending to proceed northbound on Mayfair Road will exit from the driveway accesses on the public alley, turn left on Garfield Avenue, and turn right on Mayfair Road. The added travel time and distance for those motorists will also be insignificant.

The added travel distance and time for visitors to either of the properties who are approaching the properties southbound on Mayfair Road will be significant. Access to either of the properties under either of these scenarios is complicated by the fact that the Department will also be closing the median access for the intersection with Garfield Avenue as part of the improvement project. This means that vehicles travelling south on Mayfair Road will be unable to turn left onto Garfield Avenue when travelling to the properties. These vehicles will have to pass the properties heading southbound on Mayfair Road, make a "U"-turn at a median break south of USH 45, and then proceed northbound on Mayfair Road back to the properties. Although the added time and travel for this scenario is significant, it is not a function of the closing of the Mayfair Road driveway accesses, but rather the closing of the Mayfair Road median at the intersection with Garfield Avenue. The Mayfair Road median at the intersection with Garfield Avenue will be closed regardless of whether the petitioners' driveway accesses on Mayfair Road are eliminated.

Motorists intending to proceed southbound on Mayfair Road when leaving the petitioners' properties will either exit the properties by the public alley, turn left onto Garfield Avenue, right onto Mayfair Road, and then make a "U"-turn at the intersection with North Avenue or follow the circuitous route through residential neighborhoods described by Mr. Stockham. For those motorists choosing to take the route that involves making a "U"-turn at North Avenue, the added travel time and distance and time will not be significant. Mr. Stockham testified that in his opinion most motorists will follow the more circuitous route he described to avoid having to make a "U"-turn on Mayfair Road. However, because left turns from Garfield Avenue onto Mayfair Road are currently prohibited, any motorist that wanted to avoid making a "U"-turn on Mayfair Road would already be taking the route described by Mr. Stockham because the only option now available requires making a "U"-turn at the intersection with Garfield Avenue.

The petitioners also argued that the accesses from the public alley do not constitute reasonable alternative access because of the unattractiveness of the public alley. The appearance of the properties may be material to the leasability of the space and for that reason arguably is material to the question of whether these accesses constitute reasonable, alternative access to the existing accesses on Mayfair Road. However, the aesthetics of the alley is within the control of the petitioners. Accordingly, the aesthetics of the public alley deserves little consideration.

Finally, the petitioners concede that revoking the driveway access permits and eliminating the driveway access from Mayfair Road to their respective properties will increase traffic safety and, therefore, benefit the public. One of their objections to the Department's action is that they are bearing the cost of this public benefit. This is a persuasive equitable argument. However, the only issue before the DHA is whether the accesses from the public alley constitute reasonable, alternative access to replace the Mayfair Road driveways. The DHA does not have authority to impose equitable remedies.

In summary, the accesses from the public alley are not equivalent to the existing accesses from Mayfair Road; however, the location of these alternative accesses is not atypical for properties that have frontage on high traffic volume roadways such as Mayfair Road. The location of the accesses off the public alley will not be unexpected. To the extent any confusion would exist, that confusion can easily be alleviated through some minor signage. Ingress and egress from the properties will involve added time and distance. The added travel time and distance for most motorists will not be significant. The one situation that will result in a significant increase in travel time and distance is for motorists approaching the properties southbound on Mayfair Road. However, the added time and distance for those motorists is mainly a function of the closing of the Mayfair Road median at the intersection with Garfield Avenue. These motorists will incur additional travel time and distance regardless of what happens to the subject driveways.

The closest call in balancing the petitioners' right to access with public safety is the limitations of the public alley for use as an access for commercial properties. These limitations include the narrowness of the alley, conflicts with the use of the alley by private residences, and concerns about snow removal. The petitioners' expert conceded that he would consider the accesses from the public alley reasonable, alternative accesses to the existing Mayfair Road driveway accesses if they were from a city street, as opposed to an alley. Although the public alley is narrower and is not constructed to the standards of a city street, it will accommodate the additional traffic that is projected as a result of the removal of the Mayfair Road accesses. The accesses from the alley do constitute reasonable, alternative access to the existing accesses off of STH 100. Accordingly, the Department's decisions to revoke both accesses to STH 100 should be affirmed.

CONCLUSIONS OF LAW

The Administrator concludes:

1. Petitioner J&E Investments has reasonable, alternative access to its property at 2130 Mayfair Road via the existing driveway access from the public alley at the rear of the building. The existing driveway access from STH 100 is unnecessary and reduces traffic safety on USH 100. The Department of Transportation's decision to

revoke driveway access permit number permit no. 40-27-66 is reasonable and consistent with the standards of Wis. Stat. § 86.07.

2. Petitioner 2100 Mayfair Road LP has reasonable, alternative access to its property at 2100 Mayfair Road via the existing driveway access from the public alley at the rear of the building. The existing driveway access from STH 100 is unnecessary and reduces traffic safety on USH 100. The Department of Transportation's decision to revoke driveway access permit number permit no. 40-170-64 is reasonable and consistent with the standards of Wis. Stat. § 86.07.

3. Pursuant to Wis. Stat. §§ 86.073(3) and 227.43(1)(bg), the Division of Hearings and Appeals has the authority to issue the following orders.

ORDERS

The Administrator orders:

1. The Department of Transportation's decision to revoke driveway access permit number permit no. 40-27-66 issued for the property located at 2130 Mayfair Road currently owned by J&E Investments is hereby AFFIRMED.

2. The Department of Transportation's decision to revoke driveway access permit number 40-170-64 issued for the property leased for parking by the owners of property located at 2100 Mayfair Road, currently 2100 Mayfair Road LP, is hereby AFFIRMED.

Dated at Madison, Wisconsin on September 16, 2011.

STATE OF WISCONSIN
DIVISION OF HEARINGS AND APPEALS
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By: _____
David H. Schwarz
Administrator

NOTICE

Set out below is a list of alternative methods available to persons who may wish to obtain review of the attached decision of the Division. This notice is provided to insure compliance with Wis. Stat. § 227.48 and sets out the rights of any party to this proceeding to petition for rehearing and administrative or judicial review of an adverse decision.

1. Any person aggrieved by the attached order may within twenty (20) days after service of such order or decision file with the Division of Hearings and Appeals a written petition for rehearing pursuant to Wis. Stat. § 227.49. Rehearing may only be granted for those reasons set out in Wis. Stat. § 227.49(3). A petition under this section is not a prerequisite for judicial review under Wis. Stat. §§ 227.52 and 227.53.
2. Any person aggrieved by the attached decision which adversely affects the substantial interests of such person by action or inaction, affirmative or negative in form is entitled to judicial review by filing a petition therefore in accordance with the provisions of Wis. Stat. §§ 227.52 and 227.53. Said petition must be filed within thirty (30) days after service of the agency decision sought to be reviewed. If a rehearing is requested as noted in paragraph (1) above, any party seeking judicial review shall serve and file a petition for review within thirty (30) days after service of the order disposing of the rehearing application or within thirty (30) days after final disposition by operation of law. Any petition for judicial review shall name the Division of Hearings and Appeals as the respondent. The Division of Hearings and Appeals shall be served with a copy of the petition either personally or by certified mail. The address for service is:

DIVISION OF HEARINGS AND APPEALS
5005 University Avenue, Suite 201
Madison, Wisconsin 53705-5400

Persons desiring to file for judicial review are advised to closely examine all provisions of Wis. Stat. § 227.52 and 227.53 to insure strict compliance with all its requirements.